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NTSB Order No. EA-4495

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of October, 1996

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. CARLOS ERNESTO GARTNER, Respondent.	Docket SE-14023

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued on September 7, 1995, following an evidentiary hearing.[1] The law judge affirmed, in part, an order of the Administrator, on finding that respondent had violated Chapter 3.1.1 of Annex 2 to

[1]The initial decision, an excerpt from the hearing transcript, is attached.

the Convention on International Civil Aviation.[2] The law judge dismissed a charge that respondent also violated Chapter 4.5(b) of Annex 2, which provides that, except when necessary for takeoff or landing, or except by permission from the appropriate authority, a VFR[3] flight shall not be flown at a height less than 150 meters or 500 feet above the ground or water. The law judge reduced the Administrator's 90-day proposed suspension to a $1,000 civil penalty. The Administrator appeals the dismissal of the low flight charge and the reduction of the sanction. We grant the appeal to the extent of finding that respondent violated Chapter 4.5(b). However, we further find that no sanction should be imposed on respondent in connection with his violation of Chapters 3.1.1 and 4.5(b).

The facts of the flight that led to the Administrator's order are not in dispute and were aptly summarized by the law judge. Respondent is a member of a volunteer group called Brothers to the Rescue, which (as relevant here) aids those attempting to escape Cuba by water. On June 19, 1994, respondent, as pilot in command, undertook a flight for the group. He spotted a raft with 6 to 10 persons on board in the water 25-30 miles north of Cuba.

At a height of approximately 25-30 feet, respondent dropped

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[2]This provides that a U.S.-registered aircraft, when outside the United States over the high seas, shall not be operated in a negligent or reckless manner so as to endanger life or property of others. Section 91.703(a)(1) of the Federal Aviation Regulations requires compliance with Annex 2.

[3]Visual Flight Rules.

a radio to the raft.[4] He then saw that his aircraft was damaged. (Unbeknownst to him, he testified, the aircraft had hit the raft's mast, which he had not seen.) The damage rendered the aircraft unairworthy, but respondent was able to land safely in Florida.

In his defense, respondent introduced evidence showing that the flight that day was consistent with the practices of the organization: to fly as close as possible to the rafts. He argued that the FAA Miami office was well aware of Brothers to the Rescue, its mission, and how that mission was accomplished (vis-a-vis rafters), e.g., that accurate radio drops required extremely low flight. Respondent established that the FAA had sent representatives to a meeting of the group to discuss safety issues. Respondent and others testified that at that meeting no one, despite familiarity with the Brothers' work and considerable discussion of low flight, made any mention of the existence of a rule against it. (At least one rule, regarding removal of aircraft doors, was discussed.) Respondent was not aware of the altitude restriction, but was aware of the fact that the Coast Guard routinely operated low flights in order to rescue Cuban refugees.[5]

The law judge concluded that the FAA had tacitly granted Brothers to the Rescue permission to engage in low flights. Tr.

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[4]The radios assist in the rescue effort by establishing communication.

[5]The Coast Guard sought and obtained FAA permission, pursuant to Chapter 4.5(b), to operate the low flights. Brothers to the Rescue had no permission from the FAA to depart from Chapter

at 311. The law judge stated:

> While the FAA may not have specifically authorized low flights such as that of the respondent in this case, I find there is credible circumstantial evidence of record showing that the Miami Flight Standards District Office of the FAA was aware of the practice by Brothers to the Rescue, over a period of years, and took no steps to put a stop to it, or to suggest that an exemption was needed even though the opportunity to do so was presented itself during the June, 1993 meeting with 40 of the organization's members and, apparently, officers.

The law judge went on to say:

> Under the facts of this case I find that the FAA over a period of time apparently condoned low flights by Brothers to the Rescue. . . .Under these facts I find that Brothers to the Rescue members could reasonably infer that they had permission from the FAA to operate below 500 feet altitude over the high seas when they saw rafters.

Tr. at 310-311.

On appeal, the Administrator argues that the FAA may grant no "tacit" exemptions, and that any exemption from Chapter 4.5(b) must be in writing, on petition -- a petition that Brothers to the Rescue did not file. He further argues that the FAA was under no compulsion to take enforcement action against Brothers to the Rescue, regardless of what might have been known about the operation. The Administrator argues that the law judge's decision therefore interferes with the FAA's prosecutorial discretion. Finally, the Administrator suggests that the evidence before the law judge was insufficient on which to conclude that the FAA knew or should have known that Brothers to the Rescue was conducting operations below 500 feet.

4.5(b) altitude restrictions.

Addressing the last argument first, we decline to second-guess the law judge's review of the record. The testimony is undisputed that no FAA employee at the meeting mentioned Chapter 4.5(b), or any prohibition against low flight, despite considerable discussion regarding the dangers of such operations. The evidence will also support a finding that local FAA inspectors were aware of Brothers to the Rescue operations, and that they involved flights below 500 feet. See, e.g., Tr. at 290-291, 297, 299. And, to the extent that the law judge's findings incorporate questions of credibility, they have not been shown arbitrary or capricious. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

Upholding the law judge's factual findings does not undermine FAA involvement or meeting with groups such as this. Nor should our action doing so be interpreted to undermine the basic premise of the law that ignorance is no excuse. The only issue before us here is whether, in the circumstances, the law judge was correct in dismissing the FAA's Chapter 4.5(b) charge against respondent. We believe that, rather than dismissal, the record supports findings that the violation occurred but that sanction in this case, whether suspension or civil penalty, is not appropriate.

We are compelled to reject the law judge's tacit exemption analysis, as we believe there can be no such thing. A written petition is required, and may not be granted by inspectors in the

field. Further, there is no question but that respondent failed to comply with Chapter 4.5(b). Nevertheless, we believe there are ramifications from the FAA's failure to warn.

Administrator v. Miller, NTSB Order EA-3581 (1992), which involved requirements for substituted service, is illustrative of our concern. In affirming the violation but refusing to impose a sanction, we noted:

> Particularly significant to the issues of notice and sanction is the conversation that respondent had with FAA inspector Sazama prior to one of the flights in question. During this conversation, respondent alleges -- without rebuttal -- that he told Mr. Sazama that he was flying passengers for Midcontinent and that Mr. Sazama may have opined that this was a good way to earn extra income. While subsequent to this conversation Mr. Sazama suggested that another inspector look into the matter, by his own testimony, it is clear that Mr. Sazama addressed no warning or questioning to respondent.

Id. at footnote 10.

In Administrator v. Smith, NTSB Order EA-4088 (1994), we declined to impose a sanction for failing to report a driving while intoxicated conviction where respondent had called the FAA, asked about the ramifications of a conviction on the charge, and was not told of the reporting requirement. Further, in Administrator v. Finley, 3 NTSB 2840 (1980), we declined to affirm the Administrator's order where we found that a proximate cause of the violation was air traffic control (ATC) behavior. We found that principles of fairness, rather than prosecutorial discretion, were at the heart of the case. Id. at 2842. In numerous ATC cases since, we have reduced or rejected sanctions, or dismissed charges, where we have found that ATC contributed in varying degrees to the violation (by action or omission).

In the case before us, we have equivalent concerns regarding the FAA's opportunity -- untaken -- to advise respondent and others of the group of the unlawfulness of their standard operating procedure absent a regulatory waiver. Certainly after the meeting, respondent would not have been unreasonable in believing that the Brothers to the Rescue operations, while inherently risky, generally complied with regulatory requirements. We think it reasonable, in the circumstances, to consider this prosecution improvidently brought, and mitigate its effect by waiving sanction.

While correct in arguing that the reasons cited by the law judge for sanction reduction are inconsistent with precedent, the Administrator fails to offer any precedent supporting a 90-day suspension for one instance of inadvertent carelessness. Nor do we agree with the Administrator that a suspension is needed in this case as a deterrent.[6] By having brought this proceeding, FAA has forcefully created for this pilot community notice of its intention to require compliance with Chapter 4.5(b). It may amplify this notice by direct discussion at any time it chooses. Hence, the lack of notice (with its attendant assumption of FAA acquiescence) that has given rise to the unusual circumstances of this case will not be available for future violators, who will be vulnerable to enforcement to the full extent of applicable law. Neither the public interest nor safety requires the suspension of

[6]We also do not consider our decision as interfering with the Administrator's prosecutorial discretion, which, in our minds implicates choice among competing priorities and cases in the use of resources.

respondent's certificate in these circumstances.[7]

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's appeal is granted in part, and his order is affirmed only to the extent that we find that respondent violated both Chapters 3.1.1 and 4.5(b) of Annex 2 to the Convention on International Civil Aviation.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. FRANCIS, Vice Chairman, did not concur, and submitted the following dissenting statement:

> Having found not only sufficient evidence in the record but "no question" that respondent violated both Chapter 3.1.1 and Chapter 4.5(b) of Annex 2 of the Convention on International Civil Aviation, I can not concur in the failure to impose a sanction for a proven low flight violation. Refusing to impose a sanction because hindsight arguably shows that the FAA may have missed an opportunity to clarify regulations implicated by these operations ignores the serious safety issues raised by this particular operation. We easily find that respondent operated his aircraft so carelessly that substantial damage -- sufficient to render his aircraft unairworthy -- resulted from his low flight and collision with the mast of a raft floating beneath him. I believe the public interest demands some sanction be imposed here, whether significant civil penalty or more appropriately certificate action, to ensure the protection of persons and property on the ground or in the rafts, assurance of safe aviation operations, and compliance with reasonable aviation safety regulations.

[7]In his appeal, the Administrator notes that the Board is bound by written agency policy guidance available to the public related to sanction. However, the Administrator has presented us with no such written guidance. Indeed, beyond demonstrating that the law judge's stated reasons for reducing the sanction have not been accepted by the Board, he has not supported a 90-day suspension or any other suspension period, but simply argues that suspension, rather than civil penalty, is appropriate.